**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **JOSEPH B. BATTAH** | ) | |
| Claimant | ) | |
| VS. | ) | |
| | ) | Docket No. 1,035,162 |
| **AXCET/HI-LO INDUSTRIES, INC.** | ) | |
| Respondent | ) | |
| AND | ) | |
| | ) | |
| **LUMBERMENS UNDERWRITERS ALLIANCE** | ) | |
| Insurance Carrier | ) | |

## ORDER

Respondent appeals the September 27, 2007 preliminary hearing Order of Administrative Law Judge Thomas Klein. Claimant was awarded medical treatment, with Dr. Stein as the authorized treating physician, and temporary total disability compensation from June 26, 2007, until released at maximum medical improvement or returned to employment.

Claimant appeared by his attorney, William L. Phalen of Pittsburg, Kansas. Respondent and its insurance carrier appeared by their attorney, J. Scott Gordon of Overland Park, Kansas.

The Appeals Board (Board) adopts the same stipulations as the Administrative Law Judge (ALJ), and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held September 19, 2007, with attachments; and the documents filed of record in this matter.

## ISSUES

Did claimant's alleged injuries arise out of and in the course of his employment with respondent? Respondent argues that claimant has a long history of low back problems and his current problems are nothing more than a continuation of those problems. Based on the histories provided to the various health care providers who saw claimant,

respondent alleges claimant has failed to prove his current need for medical treatment relates to his job activities and injuries with respondent. Claimant argues that his work activities with respondent have aggravated his preexisting condition, and the award of benefits should be affirmed.

## FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant was employed by respondent as a saw operator when, on March 16, 2007, while picking up a sheet of particle board, he experienced pain in his back, legs and hips. Claimant had been experiencing symptoms in those same areas for about one month before the date of accident. The following Monday, claimant advised Karen Clounch, respondent's director of human resources, that he had hurt his back and legs the previous Friday. Ms. Clounch acknowledges that claimant talked about his back complaints, but does not recall if claimant alleged a work-related injury. Claimant sought medical treatment the day after his conversation with Ms. Clounch.

The Neosho Memorial Regional Medical Center emergency room report of March 20, 2007, notes bilateral hip pain since Saturday. The cause of that pain is not mentioned in the report.[1] The patient instruction sheet from Neosho Memorial Regional Medical Center for that date instructs claimant on treatments for arthritis and bursitis. Osteoarthritis is noted to be caused by wear and tear, and bursitis is noted to be caused by "repeated minor irritation, or pressure directly on the bursa".[2]

Medical notes from the Ashley Clinic from March 26, 2007, note bilateral hip pain, intermittently for quite some time, with no inciting or recent aggravating trauma. The impression is degenerative osteoarthritis.[3] The Ashley Clinic note, signed electronically by Bruce W. Lee, D.O., does not mention a work-related connection to claimant's pain.

Claimant later came under the care of Kevin M. Mosier, M.D. In a progress note of April 30, 2007, Dr. Mosier discussed an MRI taken of claimant's hips, which was read as

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[1] P.H. Trans., Resp. Ex. 1.

[2] P.H. Trans., Cl. Ex. 4.

[3] P.H. Trans., Resp. Ex. 2.

normal.[4] The MRI indicated moderate spinal stenosis at L3-4 and L4-5 with associated disk space narrowing at L3-4.

After claimant reported his back and hip pain to Ms. Clounch, she provided claimant with information regarding short-term disability. The short-term disability intake form indicates claimant's disability is not due to an accident.[5] In a telephone conversation with a representative of Reliance Standard Life Insurance Company, claimant indicated that he had not suffered a work-related accident. However, on the Reliance Standard Life Insurance Company form filled out at the time claimant left work, the question which asked the reason for leaving was answered "back injury".[6] Claimant received short-term disability for about 8 weeks. On June 4, 2007, an evaluation of claimant's entitlement to long-term disability was made. When claimant spoke to Ms. Clounch, she advised him that his health insurance was going to lapse. At that time, claimant asked about workers compensation benefits.

Claimant was examined at his attorney's request by board certified orthopedic surgeon Edward J. Prostic, M.D., on July 18, 2007. The history provided Dr. Prostic was consistent with claimant's description of the work accident. Dr. Prostic diagnosed claimant with mild degenerative changes in the lumbar spine. He opined that claimant's problems were the result of minor trauma sustained while working for respondent.[7]

Claimant's history indicates preexisting back problems. Medical notes from Todd W. Morrison, M.D., from August 10, 2001, indicate occasional bilateral hip pain and a diagnosis of rheumatoid arthritis.[8] ER notes from Neosho Memorial Regional Medical Center from March 21, 2004, note a fall at home when claimant hit a coffee table.[9] X-rays contemporaneous with that fall display degenerative changes at L3-4 with mild interspace narrowing and marginal spur formation at that same level.

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[4] P.H. Trans., Resp. Ex. 9.

[5] P.H. Trans. Resp. Ex. 8.

[6] P.H. Trans., Cl. Ex. 7.

[7] P.H. Trans., Cl. Ex. 1.

[8] P.H. Trans., Resp. Ex. 3.

[9] P.H. Trans., Resp. Ex. 4.

## PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[10]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[11]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[12]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[13]

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.[14]

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[10] K.S.A. 2006 Supp. 44-501 and K.S.A. 2006 Supp. 44-508(g).

[11] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[12] K.S.A. 2006 Supp. 44-501(a).

[13] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[14] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

In workers compensation litigation, it is not necessary that work activities cause an injury. It is sufficient that the work activities merely aggravate or accelerate a preexisting condition. This can also be compensable.[15]

Claimant's job was a physically demanding job with regular lifting and bending involved. The fact claimant had preexisting back problems made it more likely that the heavier work with respondent could lead to increased back problems. Here, claimant suffered increased symptoms over a month-long period. The final event, while not significantly traumatic, was sufficient to require that claimant seek medical treatment. Claimant's failure to immediately identify the event as a work accident is understandable with a laborer not sophisticated in workers compensation litigation. However, claimant's histories provided to the health care providers discuss his work and the lifting involved. Even the Reliance Standard Life Insurance Company form filled out for claimant's short-term disability payments indicates a back injury was the reason for leaving work. Additionally, the only medical opinion in this record addressing causation is that of Dr. Prostic. It is persuasive that Dr. Prostic connects claimant's injuries and the work with respondent. For preliminary hearing purposes, that opinion, coupled with claimant's testimony, is sufficient to convince this Board Member that claimant did suffer a series of accidental injuries while working for respondent, and those injuries arose out of and in the course of that employment. Therefore, the Order of the ALJ is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[16] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

## CONCLUSIONS

For preliminary hearing purposes, claimant has proven that he suffered a series of injuries through March 16, 2007, arising out of and in the course of his employment with respondent. The Order of the ALJ awarding claimant benefits in the form of medical treatment and temporary total disability, if appropriate, is affirmed.

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[15] *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

[16] K.S.A. 44-534a.

## DECISION

**WHEREFORE**, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Thomas Klein dated September 27, 2007, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this ____ day of December, 2007.

BOARD MEMBER GARY M. KORTE

c: William L. Phalen, Attorney for Claimant
J. Scott Gordon, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge